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(4)

No. 09-945

# In the Supreme Court of the United States

LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN — SELF INSURERS FUND, PETITIONER

*v.*

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE


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## QUESTION PRESENTED

The McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, provides that no "Act of Congress" shall preempt "any law enacted by any State for the purpose of regulating the business of insurance," unless the Act of Congress "specifically relates to the business of insurance." 15 U.S.C. 1012(b). The United States is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), *adopted* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, a multilateral treaty that promotes enforcement of agreements to arbitrate. Article II of the Convention governs recognition by the Contracting States of written arbitration agreements. Article II(3) directs that, at the request of a party to an arbitration agreement covered by the Convention, "[t]he court of a Contracting State * * * shall * * * refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." 21 U.S.T. 2519. Congress enacted legislation providing that the Convention "shall be enforced in United States courts in accordance with this chapter" and establishing related jurisdiction and venue rules. 9 U.S.C. 201; see 9 U.S.C. 202-208. The question presented is as follows:

Whether Article II of the Convention, as implemented by 9 U.S.C. 201-208, is an "Act of Congress" subject to the anti-preemption provision of the McCarran-Ferguson Act.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to this Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

### STATEMENT

1. a. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), *adopted* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, is a multilateral treaty that governs the recognition and enforcement of arbitration agreements and of foreign arbitral judgments. Article II(1) of the Convention provides that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration" any dispute "in respect of a defined legal relationship,

whether contractual or not, concerning a subject matter capable of settlement by arbitration." 21 U.S.T. 2519. Article II(3) provides that, at the request of a party to an arbitration agreement covered by the Convention, "[t]he court of a Contracting State * * * shall * * * refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." *Ibid.* On April 24, 1968, the President transmitted the Convention to the Senate for its advice and consent. See Letter of Transmittal from President Lyndon B. Johnson to U.S. Senate, 114 Cong. Rec. 10,488. On October 4, 1968, the Senate gave its advice and consent. 21 U.S.T. 2517; see S. Exec. Rep. No. 10, 90th Cong., 2d Sess. (1968).

On July 31, 1970, Congress enacted legislation—codified as Chapter 2 of the Federal Arbitration Act (FAA), 9 U.S.C. 201-208—to implement the Convention. Pub. L. No. 91-368, 84 Stat. 692. Section 201 of the FAA provides that "[t]he Convention * * * shall be enforced in United States courts in accordance with this chapter." 9 U.S.C. 201. Section 202 provides that an arbitration agreement "arising out of a legal relationship, whether contractual or not, which is considered as commercial * * * falls under the Convention," except where the relationship is entirely between United States citizens and does not "involve[] property located abroad, envisage[] performance or enforcement abroad, or ha[ve] some other reasonable relation with one or more foreign states." 9 U.S.C. 202. Section 203 vests federal district courts with jurisdiction over actions "falling under the Convention," Section 204 specifies venue for such actions, and Section 205 provides for removal of state court actions falling under the Convention. 9 U.S.C. 203-205. Section 206 provides that "[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein

provided for" and "may also appoint arbitrators in accordance with the provisions of the agreement." 9 U.S.C. 206.

On September 30, 1970, the United States ratified the Convention, which entered into force for the United States on December 29, 1970. 21 U.S.T. 2517.

b. The McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, protects state laws regulating insurance from federal preemption. In relevant part, Section 1012(b) provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.

15 U.S.C. 1012(b).

Congress enacted the McCarran-Ferguson Act in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). See Act of Mar. 9, 1945, ch. 20, 59 Stat. 33-34. Before that decision, "it had been assumed * * * that the issuance of an insurance policy was not a transaction in interstate commerce." *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 538-539 (1978). In *South-Eastern Underwriters*, however, the Court held that Congress was authorized under the Commerce Clause to regulate alleged price fixing and anti-competitive conduct by an insurance company that conducted substantial business across state lines. 322 U.S. at 552-553. The decision "provoked widespread concern that the States would no longer be able to engage in taxation and effective regulation of the insurance industry." *St. Paul Fire*, 438 U.S. at 539.

The McCarran-Ferguson Act declares that continued state regulation and taxation of the business of insurance is

in the public interest and that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. 1011. Through its "anti-preemption" or "reverse-preemption" provision (15 U.S.C. 1012(b)), the McCarran-Ferguson Act also "remov[es] obstructions which might be thought to flow from [Congress's] own power * * * except as otherwise expressly provided in the Act itself or in future legislation." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-430 (1946). Senator Ferguson, a co-sponsor of the bill, explained during the floor debate that if there were a federal law "now on the statute books relating in some way to interstate commerce, it would not apply to insurance." 91 Cong. Rec. 1487 (1945).

2. a. Petitioner is a self-insurance fund that provides workers' compensation coverage for its members. Petitioner entered into reinsurance agreements with respondent Certain Underwriters at Lloyd's, London (Underwriters), under which Underwriters provides coverage for workers' compensation claims that exceed petitioner's self-insurance retention. Those agreements contain a mandatory arbitration clause. Pet. App. 3a.

Petitioner allegedly assigned its rights under the reinsurance agreements to Safety National Casualty Corporation (Safety National), which is also a respondent in this Court. Underwriters refused to recognize the assignment. Pet. App. 3a.

b. Safety National sued Underwriters in federal district court, seeking reimbursement for excess workers' compensation claims. Pet. App. 3a, 122a. The district court initially granted Underwriters' motion to compel arbitration, but the court subsequently quashed arbitration on petitioner's motion after petitioner intervened in the suit. *Id.* at 3a-4a, 114a-120a. The court held that agreements to

arbitrate insurance disputes are unenforceable under Louisiana law. See *id.* at 4a, 116a. The court further held that, under the McCarran-Ferguson Act, the Louisiana unenforceability rule was not preempted by the applicable federal law (*i.e.*, the Convention as implemented by Chapter 2 of the FAA). See *id.* at 4a, 118a-119a.

c. On interlocutory appeal, a panel of the court of appeals reversed, holding that the McCarran-Ferguson Act does not bar application of the Convention as implemented to enforce the arbitration provisions of the insurance policies. Pet. App. 85a-108a. The panel declined to decide whether the Convention is self-executing. See *id.* at 93a-96a. The panel instead reasoned that the Convention had been implemented by Congress and that Congress did not intend for implemented treaties to be included "within the scope of an 'Act of Congress' when it used those words in the McCarran-Ferguson Act." *Id.* at 92a.

d. On rehearing en banc, the court of appeals (by a 15-3 vote) again held that the McCarran-Ferguson Act did not bar application of the Convention as implemented, and it therefore vacated the district court's order denying the motion to compel arbitration. Pet. App. 1a-84a.

The en banc court of appeals explained that Louisiana law had been interpreted to bar enforcement of arbitration provisions in insurance contracts, Pet. App. 7a & n.11, and the court "assume[d], without deciding," that the Louisiana statute "regulates the business of insurance within the meaning of the McCarran-Ferguson Act," *id.* at 10a. The court noted the parties' agreement that the McCarran-Ferguson Act would not save a state-law arbitration ban from preemption if the Convention is self-executing, since the Convention itself is not an "Act of Congress." See *id.* at 13a. The court declined, however, to decide whether the

Convention is self-executing, see *id.* at 12a-15a, finding the answer to that question "unclear," *id.* at 13a.

Rather than resolving that issue, the en banc court of appeals held that, even assuming *arguendo* that the Convention is not self-executing, the term "Act of Congress" in the McCarran-Ferguson Act does not encompass a non-self-executing treaty implemented by federal legislation. Pet. App. 15a-18a. The court further concluded that it is the Convention rather than the implementing legislation that is being "construed to invalidate, impair, or supersede" state law. *Id.* at 19a-22a. The court explained that Chapter 2 of the FAA contains multiple references to the Convention and directs United States courts to enforce it. See *ibid.* The court also observed that its conclusion was bolstered by the "congressionally sanctioned national policy favoring arbitration of international commercial agreements." *Id.* at 31a.

Judge Clement concurred in the judgment. She would have held that Article II of the Convention is self-executing and therefore preempts state law by virtue of the Supremacy Clause. Pet. App. 38a-49a.

Judge Elrod, joined by Judges Smith and Garza, dissented. Pet. App. 50a-84a. The dissenting judges took it as given that the Convention is not self-executing because they viewed the parties as not disputing that proposition. See *id.* at 50a & n.1, 81a & n.31. They would have held that the only relevant source of domestic federal law in this case is Chapter 2 of the FAA, see *id.* at 70a-71a; that this implementing legislation is an "Act of Congress" within the meaning of the McCarran-Ferguson Act, see *id.* at 75a-76a; and that the legislation "is therefore reverse-preempted by the Louisiana statute by operation of the McCarran-Ferguson Act," *id.* at 83a.

## DISCUSSION

The court of appeals reached the correct result in this case. Pursuant to the Convention as implemented, arbitration agreements pertaining to international commercial transactions are enforceable in United States courts notwithstanding any contrary provision of state law. The court of appeals did not decide the threshold question whether Article II of the Convention is self-executing. The better view of the matter, however, is that Article II *is* self-executing, and all parties agree that the McCarran-Ferguson Act does not apply to self-executing treaties.

Even if Article II were not self-executing, the McCarran-Ferguson Act would not bar its application. The Convention's implementing legislation does not impose substantive rules of decision, but rather directs United States courts to enforce the Convention itself. As implemented by Chapter 2 of the FAA, moreover, the Convention establishes an exclusive scheme specifying the circumstances under which domestic courts must enforce arbitration provisions in international commercial agreements. Neither the Convention nor the implementing legislation excepts insurance contracts from its coverage, and the federal regime would be disrupted if a state-law arbitration ban were allowed to have that effect.

In addition to the fact that the judgment below is correct, other factors counsel against further review. First, the decision below does not create a significant conflict among the courts of appeals that warrants this Court's intervention. Second, it is not clear that the relevant Louisiana statute actually precludes enforceability of the arbitrations agreements in this case. Third, recent federal legislation likely diminishes the prospective importance of the question presented.

### A. The Judgment Of The Court Of Appeals Is Correct

1. The parties correctly agree that if Article II of the Convention is self-executing, the McCarran-Ferguson Act would not bar its application (because the Convention is not an "Act of Congress"), and Article II would preempt any contrary state law. Pet. App. 13a; Pet. 19-20; Br. in Opp. 35. In the government's view, Article II of the Convention is self-executing. That conclusion, endorsed by Judge Clement (the only judge below to decide the issue, see Pet. App. 38a-49a), provides an independent basis for the court of appeals' judgment.

In *Medellín* v. *Texas*, 128 S. Ct. 1346 (2008), this Court noted the longstanding distinction between a self-executing treaty, which upon entry into force "automatically constitute[s] binding federal law enforceable in United States courts," and a non-self-executing treaty, which does not. *Id.* at 1356. In determining whether a treaty provision is self-executing, the Court has focused on the intent of the U.S. treatymakers as evidenced by the treaty's text. *Id.* at 1357, 1364. The Court has also considered the negotiation and drafting history, as well as the post-ratification understanding of signatory nations (including the views of the Executive Branch). *Id.* at 1357, 1361.

The text of Article II of the Convention strongly supports the conclusion that Article II is self-executing. Article II(3) requires that the "*court* of a Contracting State, when seized of an action in a matter with respect of which the parties have made an agreement within the meaning of this article, *shall*, at the request of one of the parties, refer the parties to arbitration." 21 U.S.T. 2519 (emphases added). In *Medellín*, the Court noted the relevance of language mandating compliance, specifically terms such as "shall" or "must," especially when those terms constitute "a directive to domestic courts." 128 S. Ct. at 1358. Those are

precisely the elements present in Article II(3). Both the mandatory nature of Article II(3)'s text, and its direction to the "court[s]" (rather than to the governments) of the contracting States, suggest that the provision was intended to be immediately enforceable in domestic courts.

Relatedly, neither Article II(3) nor Article II(1)—which provides that "[e]ach Contracting State *shall* recognize an agreement in writing under which the parties undertake to submit to arbitration," 21 U.S.T. 2519 (emphasis added)—appears to envisage that steps beyond ratification are necessary before the Convention creates binding obligations enforceable in domestic courts. The language in those provisions stands in stark contrast to that in the treaty provision at issue in *Medellín*—"each Member of the United Nations *undertakes to comply* with the decision of the International Court of Justice," Charter of the United Nations, June 26, 1945, Art. 94(1), 59 Stat. 1051 (emphasis added)—which the Court determined did "not contemplate * * * automatic enforceability." *Medellín*, 128 S. Ct. at 1358-1359; see, *e.g.*, *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (distinguishing between treaty language that "act[s] directly on" property rights and language reflecting a commitment to enact legislation to modify those rights).

In arguing that the Convention is not self-executing, petitioner relies principally on this Court's generic citation in *Medellín* to the legislation implementing the Convention as evidence that "Congress is up to the task of implementing non-self-executing treaties." Pet. 18 n.4 (quoting 128 S. Ct. at 1366). The Court's passing reference to the implementing legislation cannot bear the weight that petitioner would give it. The dispute in *Medellín* concerned the enforceability in domestic courts of a judgment of the International Court of Justice, see 128 S. Ct. at 1353, and the citation on which petitioner relies immediately follows the

Court's statement that "[t]he judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress," *id.* at 1366. That statement implicates only Article III of the Convention, which establishes the binding nature and enforceability of foreign arbitral awards. 21 U.S.T. 2519. Even as to Article III, the *Medellín* Court's statement was dictum, since no part of the Convention was actually at issue in that case. And unlike Article II(3), Article III is not framed as a directive to the "court[s]" of the contracting States. See *ibid.* It is well established that some provisions of a treaty can be self-executing even if others are not. See 1 Restatement (Third) of Foreign Relations Law of the United States § 111, cmt. h (1987). The *Medellín* dictum therefore provides no meaningful guidance on the question whether Article II of the Convention is self-executing.

Petitioner also relies on the fact that, in submitting the Convention to the Senate for its consent, the President stated that legislative changes would be "required before the United States becomes a party to the Convention." Pet. 19 n.4 (quoting 114 Cong. Rec. 10,488 (1968)). The Legal Adviser's testimony before the Senate Foreign Relations Committee put that statement into context: "The Department of Justice * * * has suggested that implementing legislation * * * is desirable * * * to insure the coverage of the act extends to all cases arising under the treaty and * * * to take care of related venue and jurisdictional requirement problems." S. Exec. Rep. No. 10, 90th Cong., 2d Sess. 5-6. Consistent with that explanation of the purposes the implementing legislation would serve, Chapter 2 of the FAA vests the federal district courts with jurisdiction over actions falling under the Convention, 9 U.S.C. 203; specifies the proper venue for such actions, 9 U.S.C. 204; and authorizes removal of cases from state to federal court, 9 U.S.C.

205. The legislation on those subjects does not establish substantive rules of decision but merely facilitates implementation of the Convention, and is consistent with the conclusion that provisions of the Convention are self-executing. Furthermore, enactment of such legislation is consistent with the approach taken in the context of certain tax and extradition treaties that are self-executing but nevertheless are accompanied by implementing legislation to facilitate their enforcement.[1] Accordingly, the fact that domestic legislation may have been necessary to clarify jurisdiction- and venue-related issues pertaining to the implementation of the Convention does not contradict the conclusion that Article II is self-executing.

To the extent the Court finds the Convention's status ambiguous, it should defer to the State Department's view —as articulated in this brief—that Article II is self-executing. See, *e.g.*, *Medellín*, 128 S. Ct. at 1361 (citing Brief for United States as Amicus Curiae for Executive Branch's view of treaty status); *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1993 (2010) (Executive Branch's interpretation of treaty entitled to "great weight").

2. Even if (as the court of appeals assumed) Article II of the Convention were not self-executing, the Convention as implemented would preempt any contrary state law, including a state law barring enforcement of agreements to arbitrate insurance disputes. That is so for two reasons. First, Chapter 2 of the FAA does not establish substantive rules of decision that courts are bound to apply; rather, it directs courts to enforce the Convention itself. Second, the

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[1] See S. Exec. Rep. No. 12, 110th Cong., 2d Sess. 7 (2008) (noting in relation to 28 extradition treaties that the "legal procedures for extradition are governed by both federal statute and self-executing treaties. Subject to a contrary treaty provision, existing federal law implements aspects of these treaties. *See* 18 U.S.C. §§ 3181 to 3196.").

Convention and its implementing legislation were intended to establish an exclusive scheme for the enforceability of arbitration provisions in international commercial agreements.

a. The implementing legislation provides that "[t]he Convention * * * shall be enforced in United States courts in accordance with this chapter," 9 U.S.C. 201, and it vests federal district courts with jurisdiction over "[a]n action or proceeding falling under the Convention," 9 U.S.C. 203. It further provides that Chapter 1 of the FAA applies to actions and proceedings under Chapter 2 (which codified the Convention) to the extent that Chapter 1 "is not in conflict with this chapter *or the Convention as ratified by the United States*." 9 U.S.C. 208 (emphasis added). The italicized language indicates that the Convention itself may sometimes supersede Chapter 1 of the FAA even if the superseded Chapter 1 provision does not conflict with any part of Chapter 2. The clear import of those provisions is that, within the parameters and pursuant to the procedures established by Chapter 2 of the FAA, federal courts will interpret and enforce the Convention itself, not simply the statute that Congress enacted to implement it. Cf. Louis Henkin, *Foreign Affairs and the United States Constitution* 200 n.* (2d ed. 1996) (explaining that in certain circumstances the effect of the implementing legislation is to "give[] the treaty itself legal effect"); Pet. App. 24a-25a n.53.[2]

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[2] In that respect, Chapter 2 of the FAA is quite different from a hypothetical Act of Congress that directed federal courts to enforce arbitration clauses and to enforce foreign arbitral awards, but that made no express reference to the Convention itself. Such a statute might "implement" the Convention, in the sense of facilitating compliance with the United States' treaty obligations, but it would not support the view

The McCarran-Ferguson Act comes into play only when an "Act of Congress" is "construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. 1012(b). Because a treaty is not an "Act of Congress," the McCarran-Ferguson Act does not save state insurance regulation from the preemptive effect of a treaty provision that is enforceable in United States courts. That is so even if the judicially-enforceable character of the relevant treaty provision depends on the antecedent enactment of an implementing statute. Thus, even if legislation were necessary to make Article II of the Convention binding upon United States courts, Congress has enacted such legislation, and Article II accordingly supersedes contrary state law, including state insurance regulation.

b. It is a well-established canon of construction that a statute should be interpreted, whenever possible, to comply with international law. See *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."). The McCarran-Ferguson Act contains no evidence that, in protecting against "implied preemption by domestic commerce legislation" of state regulation of insurance, Congress intended to interfere with the Executive's ability to enter into and comply with international agreements—let alone those governing foreign commerce. *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 428 (2003) (noting McCarran-Ferguson Act was intended to address domestic commerce). To the contrary, the Act was not intended "to clothe the States with any power to regulate or tax the busi-

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that the Convention itself is directly enforceable by United States courts.

ness of insurance beyond that which they had been held to possess" prior to *South-Eastern Underwriters*. H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945); see *Maryland Cas. Co.* v. *Cushing*, 347 U.S. 409, 412-413 (1954) (concluding that the McCarran-Ferguson Act did not protect state law from preemption by a provision of federal admiralty law) (plurality opinion).

When the United States deposited its instrument of ratification for the Convention, it declared that it would apply the treaty "only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States." 21 U.S.T. 2566. Chapter 2 of the FAA confirms that limitation, see 9 U.S.C. 202, and further provides that "[a]n agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states," *ibid.* The Convention was thus understood to regulate an area—foreign commerce—which is "preeminently a matter of national concern." *Japan Line, Ltd.* v. *County of L.A.*, 441 U.S. 434, 448 (1979); see also, *e.g.*, *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285-286 (1976) (describing "the Federal Government's exclusive regulation of foreign commerce"). Thus, not only does Chapter 2 arguably preempt contrary state law, but reading the earlier-enacted McCarran-Ferguson Act as authorizing the several States to limit the enforceability of international arbitration agreements pursuant to Article II of the Convention would undermine the careful efforts of Congress and the Executive to clarify the United States' understanding of the Convention's scope.

In addition, application of state law to preclude arbitration of insurance-related disputes could be construed as impacting the United States' treaty obligations. In *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 538-539 (1995), this Court instructed courts to "be most cautious before interpreting * * * domestic legislation in such manner as to violate" the Convention, and it rejected an interpretation of the Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207, that would have barred enforcement of an arbitration provision in an international commercial agreement. The courts of appeals have likewise recognized that the "United States obligated itself [in the Convention] to enforce arbitration agreements between foreign and domestic contracting parties," and that "[a]ny law or decision prior in time to this express undertaking must be construed as consistent with the Convention or set aside by it." *Sedco, Inc.* v. *Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1148 (5th Cir. 1985); see *Bautista* v. *Star Cruises*, 396 F.3d 1289, 1297 (11th Cir.), cert. dismissed, 545 U.S. 1136 (2005).

The courts of appeals also have rejected application of the McCarran-Ferguson Act to "reverse preempt" other federal laws in contexts in which such reverse preemption would be inconsistent with comprehensive federal law or policy. The Second Circuit, for example, has held that the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*—neither of which specifically relates to the business of insurance or expressly preempts state insurance laws –are not subject to reverse preemption under the McCarran-Ferguson Act. See *Stephens* v. *National Distillers & Chem. Corp.*, 69 F.3d 1226, 1230-1234 (2d Cir. 1996) (FSIA); *Spirt* v. *Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1065-1066 (2d Cir. 1982) (Title VII),

reinstated as modified by 735 F.2d 23, cert. denied, 469 U.S. 881 (1984). Other courts have reached the same result with respect to other federal statutes. See, *e.g.*, *Dudek* v. *Prudential Sec., Inc.*, 295 F.3d 875, 878 (8th Cir. 2002) (holding that the McCarran-Ferguson Act does not preclude application of federal law barring certain state-law challenges relating to purchase or sale of covered securities) (following *Lander* v. *Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 120 (2d Cir. 2001)); *Patenaude* v. *Equitable Life Assurance Soc'y of the United States*, 290 F.3d 1020, 1026-1028 (9th Cir. 2002) (same); cf. *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 308 (1999) (rejecting contention that "Congress intended to cede the field of insurance regulation to the States, saving only instances in which Congress expressly orders otherwise").

The foregoing principles reinforce the conclusion that the McCarran-Ferguson Act does not authorize States to preclude enforcement of arbitration agreements encompassed by the Convention and Chapter 2 of the FAA. The Convention was intended "to unify the standards by which agreements to arbitrate are observed." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). The strong federal policy in favor of enforcing arbitration agreements under uniform standards "applies with special force in the field of international commerce," where "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" are implicated. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 631 (1985); see *Scherk*, 417 U.S. at 516 (describing international agreement to arbitrate as "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction").

The Court in *Mitsubishi* recognized that Article II(1) of the Convention "contemplates exceptions to arbitrability grounded in domestic law," and that "Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention." 473 U.S. at 639 n.21. The Court "decline[d]," however, "to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so." *Ibid.* Because the McCarran-Ferguson Act predates the Convention and does not specifically address arbitration, and because application of the Act in the manner that petitioner advocates would subvert federal efforts to deal comprehensively and uniformly with enforcement of arbitration agreements in the international commercial context, the Act is inapplicable here.

**B. This Case Does Not Warrant Further Review**

In addition to the fact that the judgment below is correct, other factors counsel against this Court's review.

1. The limited (1-1) circuit conflict alleged by petitioner (Pet. 15-17) is not sufficiently developed to warrant resolution by this Court. In *Stephens* v. *American Int'l Insurance Co.*, 66 F.3d 41 (1995), the only court of appeals decision alleged to conflict with the decision below, the Second Circuit held that the Convention is not self-executing, and that the McCarran-Ferguson Act saved from preemption a state law that precluded enforcement of an arbitration agreement in an insurance contract. *Id.* at 45. The Second Circuit offered only a cursory analysis of the Convention's preemptive effect, however, and the court might reconsider its conclusion in light of the government's view, as expressed in this brief, that Article II of the Convention *is* self-executing and preempts contrary state law. See p. 11,

*supra*; cf. *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute.").

In addition, the Second Circuit's subsequent decision in *Stephens* v. *National Distillers & Chemical Corp.*, *supra*, calls into question the continuing vitality of the prior *Stephens* decision. The Second Circuit ruled in the latter decision that, notwithstanding the McCarran-Ferguson Act, the FSIA's restrictions on attachment of foreign states' property superseded New York's requirement that out-of-state insurers post security in specified circumstances. See 69 F.3d at 1228, 1230-1231. Although the FSIA (like the Convention) does not "specifically relate to the business of insurance" or expressly preempt state insurance laws, the Second Circuit reasoned that courts must apply "federal law to the insurance industry, in spite of the McCarran-Ferguson Act, whenever federal law clearly intends to displace all state laws to the contrary." *Id.* at 1231, 1233. At the very least, the intra-circuit tension between the two *Stephens* decisions should be resolved by the Second Circuit before this Court intervenes.

2. Notwithstanding the court of appeals' assumption (Pet. App. 7a), it is not clear whether Louisiana law actually prohibits enforcement of the parties' agreement to arbitrate in this case. The relevant statute provides: "No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state * * * shall contain any condition, stipulation, or agreement * * * [d]epriving the courts of this state of the jurisdiction of action against the insurer." La. Rev. Stat. Ann. § 22:868(A)(2). Although Louisiana inter-

mediate appellate courts have held that the statute bars enforcement of an arbitration provision in state court, see *Hobbs* v. *IGF Ins. Co.*, 834 So. 2d 1069, 1071 (La. Ct. App. 2002); *Macaluso* v. *Watson*, 171 So. 2d 755, 757-758 (La. Ct. App. 1965); *Spillman* v. *United States Fid. & Guar. Co.*, 179 So. 2d 454, 455 (La. Ct. App. 1965), and the Louisiana Supreme Court and the Fifth Circuit have noted those holdings in dictum, see *Doucet* v. *Dental Health Plans Mgmt. Corp.*, 412 So. 2d 1383, 1384 (La. 1982); *McDermott Int'l, Inc.* v. *Lloyds Underwriters*, 120 F.3d 583, 586-588 (5th Cir. 1997), it is not clear that the Louisiana Supreme Court would accept that interpretation if presented with the question today. The Louisiana Supreme Court has recognized that the positive law of Louisiana favors arbitration, *Aguillard* v. *Auction Mgmt. Corp.*, 908 So. 2d 1, 7, 18 (La. 2005), and this Court has rejected the traditional view that a forum selection clause or arbitration agreement divests a court of jurisdiction. See *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972); *Scherk*, 417 U.S. at 516-518; see also *DiMercurio* v. *Sphere Drake Ins., PLC*, 202 F.3d 71, 74-79 (1st Cir. 2000).

The applicability of La. Rev. Stat. Ann. § 22:868(A)(2) is particularly uncertain in the circumstances of this case. By its terms, that statute applies only to contractual provisions that would "[d]epriv[e] the courts of this state of the jurisdiction of an action against the insurer." This suit, however, was filed in federal district court, Pet. App. 3a, and the district court held that the case remained within its jurisdiction even after the court granted petitioner's motion to quash arbitration, see *id.* at 110a. Because the choice in this case appears to be between referral of the dispute to arbitration and litigation of the case in federal court, it is unclear how enforcement of the parties' arbitration agreement in accordance with the en banc court of appeals' deci-

sion could have the effect of "[d]epriving the courts of [Louisiana]" of jurisdiction over the case. See Resp. C.A. (en banc) Br. 41-43 & n.15.[3]

3. The issue presented in this case is likely to arise less frequently in the future in light of a provision in the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376. Section 531(b)(1) of that Act, which regulates reinsurance contracts, states that "laws, regulations, provisions, or other actions of a State that is not the domiciliary State of the ceding insurer * * * are preempted to the extent that they * * * restrict or eliminate the rights of the ceding insurer or the assuming insurer to resolve disputes pursuant to contractual arbitration to the extent such contractual provision is not inconsistent with the provisions of [the FAA]." 124 Stat. 1595. In other words, Section 531(b)(1) expressly preempts state law, except the law of the State in which the ceding insurer (*i.e.*, the entity that sought reinsurance) is domiciled, to the extent that state law restricts or eliminates the resolution of reinsurance disputes through arbitration. Therefore, in cases in which Section 531(b)(1) applies, a party seeking to enforce an arbitration clause need not rely on Article II of the Convention.

It is unclear whether Section 531(b)(1) affects the resolution of this particular case, both because the identity of

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[3] If this Court concludes that the federal question presented in the petition for a writ of certiorari otherwise warrants the Court's review, the Court may wish to certify to the Louisiana Supreme Court the antecedent question whether enforcement of the parties' agreement to arbitrate is prohibited by La. Rev. Stat. Ann. § 22:868. See La. Sup. Ct. R. 12 (providing for certification of state-law questions by this Court to the Louisiana Supreme Court where the state-law issue is "determinative of" the case and "there are no clear controlling precedents in the decisions of the supreme court" of Louisiana); cf. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 75-77 (1997).

the "ceding insurer" is uncertain (petitioner is alleged to be domiciled in Louisiana but Safety National, the assignee, is not) and because this suit was filed before Section 531(b)(1) was enacted. Going forward, however, the statute presumably will reduce the number of cases in which the question presented arises. Accordingly, this Court's review of the issue, which will diminish in significance, is unwarranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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